



Ground & 1st Floors
Corporate Place
Cnr. Fredman Drive & Sandown Valley Crescent
Sandown
Sandton
2196

P.O. Box 651826, Benmore, 2010
Tel: 087 942 2700 ☐ Fax 087 942 2644
E-Mail: enquiries-jhb@pfa.org.za
Website: www.pfa.org.za

Please quote reference: PFA/GA/35214/2009/TCM

Mrs. D. T. Beytell
Plot 72 Leewfontein
Kameeldrif
PRETORIA

REGISTERED POST

Email: admin@zelitech.co.za

Dear Madam

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): D T BEYTELL (“the complainant”) v OLD MUTUAL STAFF RETIREMENT FUND (“the first respondent”) AND OLD MUTUAL LIFE ASSURANCE COMPANY (S.A.) LTD (“the second respondent”)

Introduction

- [1] This matter concerns payment or transfer of interest that accrued on the complainant’s pension interest allocated to her in terms of a divorce order handed down on 2 November 2001.
- [2] The complaint dated 20 February 2009 was received by this office on 25 February 2009. A letter acknowledging receipt of the complaint was sent to the complainant on 10 July 2009. On the same date a letter was dispatched to the respondent, giving it until 10 August 2009 to file a response to the complaint. A response dated 5 August 2009 was received from the respondent on the same date.
- [3] After reviewing the written submissions before this tribunal, it is considered unnecessary to hold a hearing in this matter. This tribunal’s determination and its reasons therefor appear below.

Dr. EM de la Rey (Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), S Mothupi (Snr Assistant Adjudicator), T Dooka (Snr Assistant Adjudicator), M Ramabulana (Snr Assistant Adjudicator), C Seabela (Snr Assistant Adjudicator), P Mphephu (Snr Assistant Adjudicator), T Nawane (Snr Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator), S Mokgara (Assistant Adjudicator), A Mnginya (Assistant Adjudicator), B Mahlalela (Assistant Adjudicator), G Mothibe (Assistant Adjudicator), P Mogashoa (Assistant Adjudicator), T Mbhansa (Assistant Adjudicator), T Tlooko (Assistant Adjudicator), R Kikine (Assistant Adjudicator)

Financial Manager: F Mantsho, Accountant: R Soldaat, HR Manager: P Mhlambi

Factual background

- [4] The complainant is the erstwhile wife of Mr. David Schalk Beytel (“the member”) who is a contributing member of the first respondent. The marriage between the complainant and member was dissolved by the High Court of South Africa (Transvaal Provincial Division) on 2 November 2001. As a result of the divorce order, the complainant became entitled to be paid the pension fund interest plus 10% interest from the date of the divorce to the date of payment, awarded to her in terms of the divorce order as and when the benefit accrues to the complainant. Paragraph 6.2 dealing with pension consequences reads as follows:
- “6.2.1 The plaintiff shall be paid an amount of equal to one-half of the Defendant's pension interest in the Old Mutual Staff Retirement and Risk Fund as at the date of the divorce when such pension benefits accrue in respect of the Plaintiff;
- 6.2.2 An endorsement shall be made in terms of section 7(8)(a)(ii) of Act 70 of 1979, in the record of the said Pension Fund to the effect that an amount equal to one-half of the Defendant's said interest as at the date of divorce is so payable to the Plaintiff;
- 6.2.3 The Plaintiff's said one-half share in the aforesaid Pension Fund shall bear interest at the rate of 10% per annum from the date of divorce to the date of payment;”
- [5] The complainant was paid her pension interest on 12 January 2009. She was however not paid the interest as stipulated in the divorce order.

Complaint

- [6] The complainant is dissatisfied that she was not paid the interest stated in the divorce order.

Response

- [7] The first respondent's submissions are as follows:
- 7.1 that in terms of section 7(8) of the Divorce Act of 1979 a court may order that portion of the pension interest of a member of a fund be awarded to the spouse of a member.
- 7.2 that ‘pension interest’ is defined in circumstances pertaining to complainant and the member with reference to the member's resignation benefit as at the date of divorce.
- 7.3 that no provision was made in the Divorce Act for payment of interest and it is therefore not permitted by any legislative provision.

- 7.4 that section 37A of the Pension Funds Act contains a general prohibition against the reduction and alienation of benefits, save as permitted in the Pension Funds Act at section 37A.
- 7.5 that even after the 2007 amendments to the Pension Funds Act, there is still no provision permitting payment of interest by a fund.
- 7.6 that the term 'pension interest' is relatively narrowly defined in section 1(1) of the Divorce Act and does not include normal interest on such share of the 'pension interest' due to a non-member "...from the date of divorce to the date of payment."
- 7.7 that in the reported case of *Old Mutual Life Assurance Company (South Africa) Limited and another v Swemmer* 2004(5) SA373 (SCA) the Supreme Court of Appeal stated on p.385 as follows:
- "Moreover, there is no provision in the relevant sections of the (Divorce) Act for the pension fund concerned to be ordered to pay the non-member spouse interest or capital growth on the portion of the pension interest allocated to that spouse from the date of divorce to the date of eventual payment."
- 7.8 that the Honourable Court could not have legally bound Respondent for the payment of interest and in Respondent's respectful view neither did it intend to bind Respondent for the payment of interest but is rather binding on the member. The first respondent further avers that having regard to the context of paragraph 6 and the specific wording of paragraph 6.2.3, it is evident that it does not even state that Respondent is liable for the payment of the 10% interest or even make reference to the Respondent.
- 7.9 that section 37D, as amended, further determines that interest becomes payable by a fund in instances where payment of the divorce award is made after expiry of 120 days from the date on which the non-member spouse was requested by the fund to make an election.

Point in limine

- [8] The respondent took issue with the divorce order in that it is invalid in so far as the payment of 'interest' is concerned since section 7(8) of the Divorce Act does not permit payment of such interest.

Determination and reasons therefor

- [9] What needs to be determined is whether or not payment of interest or capital growth is permitted by any legislative provision, in particular the Divorce Act and the Pension Funds Act.

[10] In terms of Section 37A of the Act, save to the extent permitted by the Act such as section 37D, the Income Tax Act and the Maintenance Act, no pension benefit payable by pension fund organization is capable of being reduced other than the limited instances set out in this section.

[11] The relevant parts of section 7(7) and (8) of the Divorce Act reads as follows:

“(8) Notwithstanding the provisions of any other law or of the rules of any pension fund-

(a) The court granting a decree of divorce in respect of a member of such a fund, may make an order that-

(i) Any part of the pension interest of that member which, by virtue of sub-section (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;

(ii) An endorsement be made in the records of that fund that part of the pension interest concerned is so payable to that other party;”

[12] ‘Pension interest’ is in turn defined in section 1 of the Divorce Act as follows:

“pension interest, in relation to a party to a divorce action who-

(a) Is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of the fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office;

(b) Is a member of a retirement annuity fund which was bona fide established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of the party’s contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed.”

[13] Sub-section 8 in paragraph 11 above deals with the type of order that a court granting a decree of divorce may make. This section permits a court to make an order relating to ‘pension interest’ and not an order relating to ‘interest’ or ‘capital growth’.

[14] This tribunal has to now determine whether or not paragraph 6.2.3 of the divorce order complies with section 7(7) and (8) of the Divorce Act read with section 37D of the Act.

[15] Paragraph 6.2.3 of the divorce order provides for payment of interest or capital growth by the first respondent to the complainant, a non-member spouse. The relevant sections of the Divorce Act do not provide for payment of ‘interest’ and in particular section 7(8) specifically stipulates the type of order that a court granting a decree of divorce may make and this section does not confer upon the court powers to grant an order relating to payment of ‘interest’.

- [16] In *Christelien Webber v Grant Thornton Capital Umbrella Pension Fund and Another*, Bophuthatswana High Court (case No: 961/2007 unreported) the court had to decide whether or not the second respondent was obliged to enforce a divorce order which does not comply with section 7(7) and (8) of the Divorce Act read with section 37D of the Act. In this particular case, the court ruled that no relief outside the provisions of section 7 of the Divorce Act read with section 37D of the Act, is permissible against the fund.
- [17] In *Old Mutual Life Assurance Co. (SA) Ltd and Another v Swemmer 2004 (5) SA 373 (SCA)* the court refused to give effect to the provision of a divorce order that was in conflict with section 7(7) and (8) of the Divorce Act. Van Heerden AJA on behalf of the court made the following comments:
- “This case cogently illustrates the importance of deeds of settlement and divorce orders relating to pension interests being formulated very carefully indeed in order to ensure that they fall within the ambit of subsections 7(7) and 7(8) of the Act...If this is done, then all that would be required of the pension fund in question is to perform administrative functions to give effect to the order, without the rights of the fund or the relationship between the fund and the member spouse being affected in any way, and it would not be necessary to join the fund as a party to the divorce proceedings.”
- [18] Both the cases above demonstrate that a provision in a divorce order can be unenforceable if it is in conflict with section 7(7) and (8) read with section 37D. As in this complaint, paragraph 6.2.3 of the divorce order is in conflict with section 7(7) and (8) read with section 37D of the Act and is therefore unenforceable against the first respondent.
- [19] This tribunal is thus satisfied that under the circumstances of this matter, there is no legislative provision permitting payment of interest by the first respondent to the complainant.

ORDER

- [20] In the result, the complainant's complaint is dismissed.

Dated at Johannesburg on this day of 2010

Yours faithfully

DR E.M. DE LA REY
Pension Funds Adjudicator